

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SCHOLASTIC SPECIALTY CORP AND DAVID FUND, AS OFFICER	:	DECISION DTA No. 807459
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1983 through May 31, 1986.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 5, 1991 with respect to the petition of Scholastic Specialty Corp. and David Fund, as officer, c/o James H. Tully, Jr., Esq., DeGraff, Foy, Holt-Harris & Mealey, 90 State Street, Albany, New York 12207-1780 for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through May 31, 1986. Petitioner appeared by DeGraff, Foy, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Neither the Division of Taxation nor petitioners filed a brief on exception. The Division of Taxation's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation's initial request for petitioners' books and records was adequate.

II. Whether the Division of Taxation was required to make an additional request for documents during the course of the audit.

III. Whether the audit methodology utilized by the Division of Taxation to calculate the sales tax due was proper.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "3," and "11(d)" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact, and the additional findings of fact are set forth below.

On February 19, 1987, the Division of Taxation ("Division") issued to petitioner Scholastic Specialty Corp. ("Scholastic") two notices of determination and demands for payment of sales and use taxes due. The first notice assessed a tax of \$170,248.21 for the period June 1, 1983 through May 31, 1986 plus penalty and interest. The second notice assessed an additional penalty for the period June 1, 1985 through May 31, 1986 of \$5,318.39. On the same date, the Division issued notices of determination to petitioner David Fund, as an officer of Scholastic, assessing identical amounts of tax, penalties and interest, for the same periods of time.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

Scholastic is in the business of producing and selling school uniforms and miscellaneous items of clothing associated with those uniforms. Its merchandise is predominantly aimed at children attending parochial schools in and around New York City. Mr. Fund's father-in-law was involved with Scholastic prior to the time when Mr. Fund became engaged in the business. In its early years, Scholastic sold uniforms through school administrations. A school's teachers or principal would collect money for school uniforms from the students and place the orders with Scholastic. In some cases, where a student could not afford the price of a uniform, the school administration would donate the price in whole or in part. When the business was being run in this fashion, Scholastic requested advice from the New York City Department of Finance, which at that time administered the city sales tax, regarding its sales tax liabilities. It was told that the sales were

being made to the schools, not the students, and, therefore, Scholastic need not collect any sales tax.¹

We modify finding of fact "3" of the Administrative Law Judge's determination as follows:

Over the years, Scholastic's method of doing business changed. During the audit period, uniforms were sold, and according to the testimony of Scholastic's accountant, Kenneth Cohen, and Mr. Fund, the uniforms were delivered directly to the students (or their parents). A Scholastic employee went to the schools to measure the students for uniforms and prepared a "shipping memorandum" showing the student's name and address, the student's school, items ordered, the price of each item, the total sales amount, shipping charges and the total amount due. Parents paid the amounts shown on the shipping memorandums directly to Scholastic, and the items of clothing were shipped, according to Mr. Fund, directly to the students' homes via the United Parcel Service ("U.P.S."). The memorandums were retained, according to Mr. Fund, as records of shipping because such records were required by the Interstate Commerce Commission. No documentary evidence was introduced into the record to substantiate that during the audit period uniform deliveries were made by U.P.S. to the students' homes. Scholastic also sold its products to retailers for resale and maintained separate invoices for these sales.²

¹Finding of Fact "2" of the Administrative Law Judge's determination was modified at the request of petitioners to reflect that Mr. Fund's father-in-law was "involved with" Scholastic, and did not "operate" Scholastic prior to the time Mr. Fund became engaged in the business, and in those cases where a student could not afford the price of a uniform, the school alone, not in conjunction with Scholastic, would donate the price in whole or in part. In addition, the finding was modified to note that the New York City Department of Finance administered the sales tax at the time Scholastic requested advice about its sales tax liabilities.

²Finding of Fact "3" of the Administrative Law Judge's determination originally read as follows:

"Over the years, Scholastic's method of doing business changed. During the audit period, uniforms were sold and delivered directly to the students (or their parents). A Scholastic employee went to the schools to measure the students for uniforms and prepared a "shipping memorandum" showing the student's name and address, the student's school, items ordered, the price of each item, the total sales amount, shipping charges and the total amount due. Parents paid the amount shown on the shipping memorandums directly to Scholastic, and the items of clothing were shipped directly to the student's homes. The memorandums were retained as records of shipping because such records were required by the Interstate Commerce Commission. Scholastic also sold its products to retailers for resale and maintained separate invoices for these sales."

Finding of Fact "3" of the Administrative Law Judge's determination was modified to include more detail from the record.

Scholastic is a registered vendor, and during the audit period it filed sales tax returns consistently reporting no taxable sales. It was Scholastic's position during the audit that its sales were actually made to the schools and to retailers for resale, and, therefore, that it was not required to collect sales tax on any of its sales. This position was abandoned at hearing, but it somewhat explains the course of the audit and the methodology adopted by the Division.

The audit of Scholastic began in May 1986. The Division sent Scholastic a letter dated May 1, 1986, scheduling a field examination of Scholastic's books and records for the period June 1, 1983 through February 28, 1986. Scholastic was instructed to make available all books and records pertaining to its sales tax liability for the period under audit. Attached to the letter was a checklist of particular records required including: a general ledger; a cash receipts journal; a cash disbursements journal; Federal income tax returns for the years 1984 and 1985; sales tax returns; cancelled checks; purchase invoices, sales invoices and expense invoices for a period "to be determined later"; fixed asset invoices; and resale, exempt and capital improvement certificates supporting nontaxable sales.

We make the following additional finding of fact:

The checklist attached to the audit appointment letter was entitled, "Required Records for Sales Tax Audit." As part of its heading, it stated that the records requested were for the audit period "6-1-83 to 2-28-86." Item number 7, which was checked, was "Sales Invoices For: ," next to which was the handwritten notation: "To be determined later."

The examination of books and records was conducted at the office of Scholastic's accountant, Kenneth Cohen. Scholastic provided the Division with the following records: Federal and State income tax returns with related workpapers, sales invoices, purchase invoices, a general ledger, a check register and cancelled checks, monthly bank statements, journal entry sheets, and resale and exempt organization certificates. The auditor's workpapers state that the only record requested which was not made available was a regular sales journal. The Field Audit Report states: "Vendor maintains adequate books and records, however, since the resulting

assessments were not generated through the use of the tests of the records, the test period agreement was not obtained."

The sales invoices made available by petitioner consisted, in part, of invoices prepared by Scholastic for the schools. Scholastic paid a commission to each school based upon total student sales at the school. Each November, Scholastic prepared invoices summarizing sales to students by school for the purpose of computing the school's commission. On audit, Mr. Cohen explained that these were the invoices relied on by Scholastic to prepare its Federal and State income tax returns. Apparently, he also offered these invoices to the auditor as evidence that the uniform sales were made to the schools and not the students. Scholastic also provided the Division with invoices documenting its sales to retailers and with resale certificates substantiating the nontaxable status of those sales.

On audit, the Division maintained that Scholastic's retail sales were made directly to the students and not to the schools. It based this position on several factors, including, primarily, Scholastic's records, which showed that the uniforms were paid for by the students' parents and that the monies were collected by and paid directly to Scholastic. Accordingly, the Division's calculation of Scholastic's sales tax liability focused upon a computation of the sales made to students.

In the course of the audit, Mr. Cohen described to the auditor the shipping memorandums which documented the sales to students. There is some dispute between the parties regarding the Division's course of action with respect to these documents. The following handwritten notation appears in the audit workpapers:

"Discussion with acct. Told him [the Division's] . . . position -- sales to the schools are really sales to the individual students -- Based on fact that the payment is made directly from the student to Scholastic Spec.

"Acct. stated that the invoice that Spec. sends to the student is not an invoice, but a memo of acct. We say that it is the invoice. It is this document that student acts on & pays, again directly to Spec."

The notation continues, but it does not indicate that the student invoices or memorandums were requested for review. The auditor, Jose Rances, under cross-examination testified as follows:

"Q: But yet you have testified that there was a record kept at the accountants called the 'shipping memo record' and which would describe where these uniforms were shipped?

"A: We asked the accountant about these memorandums and he said they were not available at the time and that this invoice that he showed us [the invoices to the schools] were the invoices.

* * *

"Q: That you asked the accountant for the memo shipment file, whatever it's called, and he refused to give it to you?

"A: I didn't say he refused.

* * *

"I said during the discussion of this 'memo forms' I was asking if they were available, and he said, 'No they were not available.' That the invoices that he presented to us are the invoices."

Mr. Cohen testified that Scholastic maintained the shipping memorandums and that they were available for examination, but that the Division never asked to review them. He estimated that the shipping memorandums filled 20 "books" (apparently, meaning cartons). Although Scholastic contended that the shipping memorandums could be traced through its books and records to calculate its taxable sales exactly, it presented no evidence to show the manner in which the shipping memorandums were maintained, the order in which they were kept, or the method that could be used to trace the memorandums to other books of account.

For its own internal accounting purposes and to calculate gross receipts for income tax purposes, Scholastic maintained a set of books and records essentially premised upon bank deposits. Scholastic entered into evidence examples of the following records:

(a) A Deposit Journal. This consisted of looseleaf pages where Scholastic listed its bank deposits. Deposits were made regularly, if not on a daily basis. Checks received from students were totaled and entered on the looseleaf sheets by school. Other receipts (sales to retailers, loans received, etc.) were listed by source and amount. The total receipts from all sources were intended to equal the bank deposits for that day.

(b) Accountant's ledger sheets. Mr. Cohen posted the daily bank deposit figures to ledger sheets. Ledger sheets entered in evidence were transcribed by the auditor from the accountant's records and were referred to as a summary of bank deposits. Entries on the ledger sheets correlate with daily figures shown on the sample page of the deposit journal.

(c) Journal of customer accounts. Scholastic maintained a hardcover journal where it listed its regular customers in alphabetical order and posted orders and payments received from those customers by month. The schools, not the students, are listed in this journal. Monthly figures taken from this journal were the basis for the annual invoices prepared for the schools.

We modify finding of fact "11(d)" of the Administrative Law Judge's determination to read as follows:

(d) Shipping memorandums or sales invoices. These were described in detail above. At the hearing, Scholastic submitted a single document which was introduced as a "shipping memorandum."³

In addition to the listed records, Scholastic also maintained a general ledger. The auditor testified that "[t]he bank deposit and general ledger are one of the same". This comports with Mr. Cohen's description of the general ledger as a summary, prepared on a "catch as catch can" basis, for income tax purposes. Year-end adjustments were made in the general ledger to reflect checks returned for insufficient funds. For this reason, the general ledger showed lower annual receipts than did the invoices prepared for the schools and retail establishments.

³We modified the Administrative Law Judge's original Finding of Fact "11(d)" to add the last sentence.

To determine Scholastic's taxable sales for the audit period, the Division followed the following procedure:

(a) The auditor transcribed all invoices for the audit period. These were divided into two groups, invoices representing sales for resale and the annual invoices made out to individual schools. The invoice amounts were segregated by sales tax jurisdiction (New York City, Nassau County, Suffolk County, Yonkers and Westchester) based upon the location of the retail business or school to which the invoice was written.

(b) The invoice amounts were totaled as a whole and by jurisdiction to compute total audited gross sales and audited gross sales by sales tax jurisdiction. Sales for resale were subtracted from gross sales to calculate taxable sales by jurisdiction. Taxable sales in each jurisdiction were then divided by total audited gross sales for all jurisdictions. The resulting percentages represented a taxable percentage by jurisdiction. For example, as calculated by the Division, New York City had taxable sales of \$1,904,851.90. This figure was divided by audited gross sales for all jurisdictions of \$3,219,006.98 to calculate a taxable percentage of 59.17%.

(c) The jurisdictional percentages were applied to Scholastic's bank deposits. Because the general ledger (or record of bank deposits) was maintained on a calendar year basis, the Division adjusted the bank deposits to allocate them to sales tax quarterly periods. The adjustment consisted of adding deposits for a six-month period and dividing the result by two to calculate bank deposits per sales tax quarters. Referring back to the example above, the Division determined that Scholastic's taxable New York City sales amounted to 59.17% of its total audited gross sales. Bank deposits for the first six months of the audit period were determined to be \$549,945.65. This figure was divided by two to calculate bank deposits for the period June 1, 1983 through August 31, 1983 of \$274,972.82. The taxable percentage for New York City (59.17%) was applied to bank deposits to calculate taxable sales for the period ended August 31, 1983 of \$162,701.41. The same procedure was used for each quarter and each taxing

jurisdiction. The appropriate tax rate was applied to taxable sales for each jurisdiction to calculate tax due.

At the end of the audit, the period of assessment was extended to include two quarterly periods not originally included in the audit period. The auditor's workpapers show that bank deposits were estimated for those quarters. Following a conciliation conference, the Division issued conciliation orders, dated August 25, 1989, reducing the tax assessed against Scholastic and Mr. Fund to \$141,638.47. This represents a cancellation of the tax assessed for the last two tax quarters of the assessment period. The conciliation orders also cancelled penalty and reduced interest to the minimum. No conciliation orders were introduced into evidence with regard to the notices of determination which assessed a separate penalty.

After the notices of determination were issued, the Division surveyed 51 schools asking them whether they or their students paid for uniforms purchased from Scholastic. All 39 of the schools which responded stated that the students paid Scholastic directly for the uniforms.

The Division's auditor explained that bank deposits were used as the base from which to calculate taxable sales because they took into account year-end adjustments for returned checks while the invoices did not. As a consequence, the total of all bank deposits (\$3,069,182.59) was less than the sum of the sales invoices (\$3,219,006.98). Under cross-examination, the auditor admitted that the Division had a record of monthly bank deposits and could have used that record to calculate quarterly bank deposits more exactly, rather than using an estimate based on a six-month period.

We make the following additional findings of fact:

The Division noted in its Field Audit Report, dated March 12, 1987 (Division's Exhibit "H"), that "the only involvement which the school had was allowing vendor's representatives the use of the school's premises for the measurements of and deliveries of the uniforms to the students."

The Division's auditor, Mr. Rances, testified as follows before the Administrative Law Judge:

"Q: (on direct examination) As far as the records provided to you by the taxpayer were concerned, where was the location of the delivery of the uniforms?

"A: According to the accountant during the discussions, deliveries were made to the school.

* * *

"Q: (on examination by the A.L.J.) Did you ever see any invoices or any records from the taxpayer that they were directly shipping to the students?

"A: No, I didn't.

* * *

"Q: (on cross examination) How did you make a determination that the uniforms, which you alleged are being sold to these students or their parents, were sold at the location that you used to determine you tax?

"A: During the interview with the accountant when we were conducting the business, we asked the accountant how the business was transacted by the vendor and this is what we understood the vendor, how it did its business [sic].

"The percent that they come to goes to the school for purposes of measuring, the taking the measurements of the students and deliveries to the school where the parents then pick up the uniforms [sic].

* * *

"Q: (on re-direct examination) As far as these summary invoices were concerned, in accordance with your understanding, that the method of operation of the schools was to deliver the uniforms to the schools wouldn't have mattered what the students' addresses were [sic]?

"A: No, they wouldn't have.

"Q: Would you have taxed the sales according to the designation of the uniforms? In other words, to the schools, if that's where they were being delivered?

"A: Yes.

"Q: Do you know if the memo invoices would have shown ship to addresses different than the schools?

"ADMINISTRATIVE LAW JUDGE: It's a highly speculative question.

"Q: Whether he knows or not, if you don't know, say you don't know.

"ADMINISTRATIVE LAW JUDGE: He couldn't know. He didn't see them, he has testified to that."

OPINION

The Administrative Law Judge concluded that: (1) the Division was aware of the existence of the shipping memoranda and was aware that these memoranda contained information necessary to calculate the amount of the tax due during the period (i.e., the tax jurisdiction for each sale); (2) the checklist attached to the field audit appointment letter indicated that the period for which the sales invoices were requested was "to be determined later," thereby leaving open the question of exactly which records were to be provided on audit; (3) the holding in Chartair is applicable to this case in that "the honest and conscientious taxpayer who maintains comprehensive records . . . has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43); (4) the auditor a) never made a positive, direct request to examine the shipping memoranda, and if any request was made, it was "weak and casual" at best, and b) "decided to employ an audit method which did not utilize [the shipping memoranda] in any fashion" (Determination, conclusion of law "B"); (5) "it was incumbent upon the Division . . . to review [the shipping memoranda] before resorting to an indirect method of calculating petitioners' sales tax liability" (Determination, conclusion of law "C"); and (6) "while the Division's calculations of the tax due relied on petitioners' books and records, estimating techniques were employed, at least for the purpose of allocating sales to quarterly periods and taxing jurisdictions" (Determination, conclusion of law "C").

The Administrative Law Judge granted petitioners' petition and cancelled the notices of determination and demands for payment of sales and use taxes due issued on February 19, 1987.

On exception, the Division asserts that: (1) at the time of the audit, the auditor could not possibly have known what information was included in the shipping memoranda because the auditor did not see them; (2) the language "to be determined later" on the Division's request to see sales invoices did not relate to which records were to be made available, but rather to the time period to be covered by those records; (3) the Division did not employ an improper audit method by not utilizing the shipping memoranda because the auditor was told by petitioners' accountant that a) the documents were unavailable and b) viewing the shipping memoranda would serve no purpose because the uniforms were delivered to the schools; and (4) the Administrative Law Judge impermissibly extended Chartair's ruling to apply to a situation where a taxpayer's sales are determined from its own records and the only issue in controversy is the tax rate to be applied.

Petitioners contend that: (1) as the sales were made to the students and delivered to the students' homes, each sale should be taxed at the tax rate for the jurisdiction in which the student resided; (2) the Division never asked for the shipping memoranda which would have disclosed where each student resided; (3) had the Division utilized all the books and records, specifically the shipping memoranda, a more precise tax liability would have been computed; and (4) the Division's averaging method for allocating the sales tax due to various tax quarters was arbitrary and capricious.

We reverse the determination of the Administrative Law Judge.

We first address whether the Division made an adequate request for petitioners' books and records.

Initially, it is necessary to note that there is no question that the sales here were taxable. Petitioners' position on audit was that the uniforms were being sold to the schools and, therefore, the sales were exempt from tax. The Division determined at an early point in the audit, and so informed petitioners, that these were taxable sales because the students (or their parents) were paying petitioners directly for the uniforms, and there was no evidence that the schools were purchasing the uniforms. Petitioners continued to assert at hearing that the sales were exempt

sales to the schools; however, they introduced no evidence and made no legal arguments in support of this position.

The record indicates that at the commencement of the audit, the Division requested, via an audit appointment letter, all the books and records pertaining to petitioners' sales tax liability for the period under audit, and that such request included a request for all sales invoices as well as the cash and sales journals (Exhibit "K"). Attached to the letter was a checklist of "Required Records for Sales Tax Audit" which as part of its heading stated that the records requested were for the audit period "6-1-83 to 2-28-86." Item number 7, which was checked, was "Sales Invoices For: ," next to which was the handwritten notation: "To be determined later" (Exhibit "K"). While the Administrative Law Judge concluded that the phrase "to be determined later" referred to the period for which sales invoices were requested, she found that this notation "left open the question of exactly which records were to be provided on audit" (Determination, conclusion of law "B") and, thus, the Division's request for petitioners' books and records was inadequate because it failed to make an adequate request for the shipping memoranda. We disagree.

In response to the Division's request for books and records, petitioners provided for the entire audit period the summary invoices sent to each school. These invoices summarized the total uniform sales made each year to each school's students. The record indicates that the auditor was told by petitioners' accountant that: 1) the summary invoices were the only invoices utilized by petitioners, and 2) the uniforms were shipped by petitioners to the schools to be picked up by the students. Operating under the belief that the uniforms were delivered to the schools, the Division determined that each school was the location of that school's sales and that petitioners' books and records (specifically, the summary invoices) adequately provided the locations of each school and the amount of sales at each school. Determining the proper taxing jurisdiction and, therefore, the sales tax rate to be applied to the sales, was then based upon each

school's address.⁴ Under these circumstances, we find that the Division's initial request was a complete and adequate request.⁵

We next address whether the Division was required to make an additional request for the shipping memoranda during the course of the audit. As previously noted, petitioners' position throughout the audit was that the uniforms were sold to the schools and delivered to the schools. At the hearing, petitioners changed their position as to the place of delivery. However, it is what the Division was told during the audit that is relevant for the purpose of establishing whether the Division had a responsibility to request additional records, i.e., the shipping memoranda. There is nothing in the record to indicate that during the audit the Division was made aware that the uniforms were delivered anywhere other than to the school locations; petitioners never asserted that the auditor was told that the uniforms were delivered to the students.⁶ Having been told that the uniforms were delivered to the schools, the auditor had no reason to believe that the summary invoices provided by petitioners did not contain the information he needed to determine the amount of gross sales and the tax jurisdiction in which those sales took place. If the auditor's understanding of petitioners' business was in error, it was an error of petitioners' making. Consequently, the Division had no responsibility to make a specific additional request for the

⁴The Division's regulation 20 NYCRR 525.2(a)(3) states that the sales tax is a "destination tax"; the point of delivery or point at which possession is transferred to the purchaser controls both the tax incident and the tax rate (see also, 20 NYCRR 526.7[e]).

⁵This is not a case in which the failure to designate the period for which records were to be produced results in the request being inadequate. In response to the request, petitioners produced records (the summary invoices) for the entire audit period, indicating clearly that there was no confusion as to the period for which records were to be produced (compare, Matter of Top Shelf Deli, Tax Appeals Tribunal, February 6, 1992 [where an undated letter requesting books and records "for the period under audit" where the audit period was listed as "6/1/84 to Present" was found to be an unclear and, therefore, inadequate request]). Petitioners' actual production of the summary invoices for the entire period indicates that petitioners were provided with an adequate, meaningful opportunity to produce their books and records (Matter of Todaro, Tax Appeals Tribunal, July 25, 1991).

⁶While the record does indicate that the Division was aware that there was a document called a "shipping memorandum," and that the Division informed petitioners that the shipping memoranda were also considered sales invoices, at no time during the audit were the shipping memoranda made available to the Division's auditors. It is also unclear whether an examination of the shipping memoranda would have disclosed that the uniforms were actually shipped directly to the students' homes, as opposed to merely indicating the billing address and the amount to be paid.

shipping memoranda during the course of the audit as the Division had no reason to believe that the memoranda would be relevant to calculating the tax.

The second issue to be addressed is whether the method utilized by the Division to calculate the sales tax due was improper.

It is clear that the Division cannot simply ignore a taxpayer's records and use an indirect method to estimate the tax due if the taxpayer's records are readily available and provide an adequate basis on which to determine the amount of tax due (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858; Matter of Chartair, Inc. v. State Tax Commn., supra). "The honest and conscientious taxpayer who maintains comprehensive records . . . has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43). Here, however, petitioners did not have some of the records needed to make an exact calculation of the tax. Specifically, the invoices provided to the auditor summarized the yearly total of uniform sales made at each individual school, but did not identify those sales where the merchandise had later been returned to petitioners. The Division determined that petitioners were entitled to an allowance for these returned sales, however, the books and records provided to and examined by the Division during the audit did not contain the detail needed to calculate an exact tax computation as there was no way to connect a particular return to a particular sale.

When records are not provided or are incomplete and insufficient, it is the Division's duty to select a method reasonably calculated to reflect the taxes due (Matter of W.T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869; Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451). In this case, as the books and records were insufficient to calculate the exact amount of tax due, the Division utilized an indirect audit method to calculate the tax using records which petitioners provided.

Petitioners contend that a more accurate tax computation would have resulted by utilizing the actual deposits for each month instead of using averages to allocate the sales to the various tax quarters and that this results in the audit being fatally flawed.

It has long been recognized that the burden of proof to overcome assessments rests upon the petitioner (Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027; Matter of Young v. Bragalini, 3 NY2d 602, 170 NYS2d 805; Calder v. Graves, 286 NY 643). In addition, where the petitioner's books and records are incomplete and/or insufficient, the petitioner must demonstrate "by clear and convincing evidence that the method of audit or the amount of the tax assessed was erroneous" (Matter of Surface Line Operators Fraternal Org. v. Tully, supra, 446 NYS2d 451, 453).

Petitioners here have not demonstrated that the Division's calculation of taxable sales based upon the general ledger was erroneous, nor did they establish (or even attempt to establish) what the tax liability would be based upon the shipping memoranda. In fact, the record indicates that petitioners were prepared to accept the Division's calculations for specific tax quarters in place of their own when such calculations resulted in a lower liability for those specific sales tax quarters.

As petitioners have not shown the Division's assessment to be erroneous, we conclude that the Division's estimate of petitioners' liability was proper.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Scholastic Specialty Corp. and David Fund, as officer is denied; and

4. The notices of determination and demands for payment of sales and use taxes due for the period June 1, 1983 through May 31, 1986, are sustained.

DATED: Troy, New York
September 10, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner